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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~1123~~ 71-1223

CALDERONE ENTERPRISES CORPORATION,
Petitioner,

against

UNITED ARTISTS THEATRE CIRCUIT, INC., ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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UNITED ARTISTS THEATRE CIRCUIT, INC., ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted on behalf of those respondents who are engaged in the business of producing or distributing motion pictures.* This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered December 28, 1971 (29a)** which judgment affirmed an order of the

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*They are Twentieth Century Fox Film Corp., National General Pictures Corporation, Columbia Pictures Industries, Inc., Paramount Pictures Corp., Metro-Goldwyn-Mayer, Inc., United Artists Corporation and Warner Bros. Inc. (sued herein as Warner Bros.-Seven Arts, Inc.). Petitioner also sought damages from the exhibitor-respondents Metropolitan Playhouses, Inc., United Artists Theatre Circuit, Inc., and United Artists Eastern Theatres, Inc. (hereinafter collectively referred to as "UATC") (none of which has any connection with United Artists Corporation), which companies are engaged in the business of operating motion picture theatres.

**All "a" references are to pages of petitioner's appendix. All "¶" references are to paragraphs of the Complaint which is set forth at pages 1a through 17a.

United States District Court for the Southern District of New York entered May 24, 1971 (23a). The latter order dismissed petitioner's three antitrust causes of action for lack of standing and dismissed petitioner's three breach of contract causes of action for lack of federal jurisdiction (23a).*

QUESTION PRESENTED

Whether a non-operating landlord of motion picture theatres leased to an operating exhibitor has standing to invoke the antitrust laws for an alleged conspiracy among its tenant, exhibitors competing with its tenant and certain distributors of motion pictures, the only alleged purpose of which was to monopolize and control the licensing and exhibition of motion pictures.

STATEMENT OF THE CASE

The Complaint alleged six causes of action, each of which sought damages allegedly sustained by petitioner as the non-operating landlord of three motion picture theatres. The only business in which petitioner alleged it was engaged with respect to these theatres was the leasing of these theatres to UATC (¶¶ 6-8, 25, 26, 34, 35) (4a, 9a, 12a).

Petitioner's Breach of Contract Counts

In its fourth, fifth and sixth causes of action, petitioner claimed to have been directly and proximately damaged in the total sum of $2,350,815 as the result of UATC's breach

*Petitioner still has its state court remedy for breach of contract. See p. 9, *infra*.

of their lease obligations to refrain from affirmative acts which would reduce the percentage rental payable to petitioner with respect to operation of the three theatres (¶¶ 45-50) (15a-16a). Federal jurisdiction over these causes of action was asserted to be pendent to the antitrust causes of action, *infra*. The distributor-respondents were not made party-defendants to any of those three causes of action.

Petitioner's Antitrust Counts

In its first three causes of action, petitioner sought to obtain treble the amount of actual damages claimed by it as a result of its tenants' (UATC) alleged breach of their lease obligations. Petitioner asserted that its predecessor in interest had leased the three theatres to UATC in 1947 for an annual fixed rental with additional rental, if any, to be based upon a stated schedule of percentages of annual gross receipts for each of these theatres (¶¶ 7, 8, 9, 25, 27, 34, 35) (4a, 9a, 12a); and that UATC had operated each of these theatres under these lease agreements through April 16, 1970, the date upon which this action was commenced (¶¶ 11, 25, 34) (6a, 10a, 13a). It is undisputed that petitioner did not reserve to itself any right to participate in the operation or management of these theatres (24a, 31a).

The complaint then alleged a conspiracy among a number of operators of motion picture theatres (none of whom, except UATC, was joined as a defendant in this action) and certain distributors* of motion pictures, having as its purpose the monopolization and control of the licensing and exhibition of motion pictures in the New York Metropoli-

*The distributor-respondents or their subsidiaries are in the business of licensing the right to exhibit motion pictures to operators of motion-picture theatres (exhibitors).

tan area pursuant to a system of distribution known as "Showcase" (¶¶ 16-17) (5a-6a, and Petition p. 4). Petitioner pleaded that pursuant to this conspiracy, UATC and the other exhibitors agreed not to compete with each other for licenses to exhibit motion pictures on first neighborhood run but, instead, allocated such motion pictures among themselves for exhibition in groups of theatres called "Tracks" (¶ 18) (6a).

Petitioner is neither a distributor nor an exhibitor of motion pictures. Its only business relevant to this complaint was its leasing of the three theatres to UATC which in turn operated them as an exhibitor of motion pictures. (See p. 2, *supra*.) Nevertheless, in order to take advantage of the treble damage provisions of the Sherman and Clayton acts, petitioner claimed, as it had to, direct and proximate injury resulting from the alleged agreement. In support of this assertion, petitioner pleaded that UATC did not seek to compete for the right to exhibit motion pictures which were expected to have great popular appeal; that if UATC had actually sought to license those pictures and had in fact succeeded in obtaining them, they would have achieved greater popularity at the box office when exhibited at the three theatres than at least some of the other films which UATC did in fact exhibit there; that consequently, UATC's gross receipts at these theatres were not so large as they might have been had those pictures actually been played; that, in turn, the percentage rentals payable to petitioner by UATC were not so great as they also might have been; and that this decline in rentals itself in turn reduced the value of the fee (¶¶ 19, 23, 32, 41) (7a, 8a, 9a, 11a, 15a).

REASONS FOR DENYING THE PETITION

1. There Is No Conflict Among the Circuit Courts Which Requires Resolution by This Court.

In an economic sense, it can be argued that most persons are injured to some degree in their "business or property" by every violation of the antitrust laws. It was clearly not the intention of Congress, however, to permit each such person to institute a private antitrust action and to recover the windfall of treble damages. As this Court most recently stated in *Hawaii* v. *Standard Oil Co. of Calif.*, 92 S. Ct. 885, 891 n. (1972):

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. [citing cases from every Circuit]."

Consequently, section 4 of the Clayton Act has consistently been interpreted as applying only to those persons whose business or property was actually aimed at, or directly rather than indirectly injured by the alleged anticompetitive conduct—*i.e.*, only to those persons who were within the "target area" of the acts complained of. *Fields Productions, Inc.* v. *United Artists Corp.*, 432 F. 2d 1010 (2d Cir. 1970), *affirming*, 318 F. Supp. 87 (S. D. N. Y. 1969), *cert. denied*, 401 U. S. 949 (1971); *Mulvey* v. *Samuel Goldwyn Productions*, 433 F. 2d 1073 (9th Cir. 1970), *cert. denied*, 402 U. S. 923 (1971); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F. 2d 183 (2d Cir. 1970), *cert. denied*, 401 U. S. 923, *rehearing denied*, 401 U. S. 1014 (1971); *SCM Corp.* v. *Radio Corporation of America*, 407 F. 2d 166 (2d Cir.), *cert. denied*, 395 U. S. 943, *rehearing denied*, 396 U. S. 869

(1969); *Productive Inventions Inc.* v. *Trico Products Corp.*, 224 F. 2d 678 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956); *Melrose Realty Co.* v. *Loew's Inc.*, 234 F. 2d 518 (3d Cir.), *cert denied*, 352 U. S. 890 (1956), *rehearing denied*, 355 U. S. 900 (1957); *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312 (E. D. Pa. 1953), *aff'd*, 211 F. 2d 405 (3d Cir.) *cert. denied*, 348 U. S. 828 (1954); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383 (6th Cir. 1962), *cert. denied*, 372 U. S. 907 (1963); *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564 (7th Cir.), *cert. denied sub nom, Illinois* v. *Commonwealth Edison Co.*, 375 U. S. 834 (1963); *Nationwide Auto App. Serv., Inc.* v. *Association of C. & S. Co.*, 382 F. 2d 925 (10th Cir. 1967); *Robinson* v. *Stanley Home Products, Inc.*, 178 F. Supp. 230 (D. Mass.), *aff'd*, 272 F. 2d 601 (1st Cir. 1959).

Petitioner tries to create the impression of a conflict between the Circuits in the application of this principle to specific cases where non-operating landlords have sought to recover treble damages as a result of the alleged violation of the antitrust laws. On analysis, however, these cases fail to support petitioner's proposition.

In the *Melrose* and *Harrison* decisions, *supra*, standing was denied to a non-operating landlord of a motion picture theatre precisely because the alleged purpose of the conspiracy was, as here, to monopolize the business of distributing and exhibiting motion pictures and not the business of leasing motion picture theatres. See also, *Lieberthal* v. *North Country Lanes, Inc.*, 221 F. Supp. 684 (S. D. N. Y. 1963), *aff'd on alternate grounds*, 332 F. 2d 269 (2d Cir. 1964) and *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401 (S. D. N. Y. 1961).

While the Ninth Circuit's decision in *Steiner* v. *20th Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956)

permitted a non-operating landlord to maintain a treble damage action, its rationale, rather than supporting petitioner's argument, makes clear why petitioner has no antitrust standing.* Thus, the conspiracy pleaded in the *Steiner* complaint was aimed at forcing the landlord to make a lease with his tenant at less than a reasonable rent, thereby causing that landlord injury in his business of leasing motion picture theatres and placing him within the "target area" of the alleged illegal conduct. In contrast, petitioner here makes no claim that the alleged conspiracy was directed against it, but rather alleges that the conspiracy was directed against the distribution and exhibition of motion pictures, a line of commerce in which petitoner was not a participant.

Apparently, the Ninth Circuit itself recognizes that the *Steiner* holding is of limited application for it recently cited with approval, albeit in a case not involving a landlord, the decisions in *Melrose, supra, Productive Inventions, supra* and *Bookout* v. *Schine Chain Theatres, Inc.*, 253 F. 2d 292 (2d Cir. 1958) as authority for the "long established" propositions that "lessors . . . and others of like remoteness lack standing to obtain damages under the antitrust laws". *Hawaii* v. *Standard Oil Co. of Calif.*, 431 F. 2d 1282, 1285 (9th Cir. 1970), *aff'd*, 92 S. Ct. 885 (1972).

Petitioners only other authority, *Congress Building Corp.* v. *Loew's Inc.*, 246 F. 2d 587 (7th Cir. 1957), while never expressly overruled in its circuit, has certainly been seriously eroded as a result of the criticism of it expressed by Judge Hastings in his concurring opinion in *Saudidge* v. *Rogers*, 256 F. 2d 269, 278 (7th Cir. 1958). The alleged conflict between *Congress* and the cases above cited in all other Circuits was the basis for the petitions for certiorari in *Fields, supra* and *Mulvey, supra*, which were before this Court at the same time. Nevertheless, this Court has

*The *Steiner* opinion cited *Harrison* with apparent approval, but distinguished it on the facts.

denied certiorari in those two cases and whenever this question has been presented to it, (see *e.g.*, cases cited at pp. 5-6, *supra*), from which it would appear either that there is no conflict among the Circuit Courts or that the alleged conflict is not of such a nature as to require resolution by this Court.

2. Petitioner's Remaining Reasons Are Equally Without Merit.

The decision below is not in conflict with the statements appearing in the cases cited at page 7 of petitioner's brief, which stand for the proposition that the antitrust laws are to be given a liberal interpretation to effectuate the intent of Congress. First, these cases provide a general method of approach to enforcement of the antitrust laws, within whose fabric the cases relied upon by respondents and found controlling by the courts below were determined. Second, as this Court noted in *Hawaii* v. *Standard Oil of Calif.*, *supra*, at 891 n., it was not Congress' intent to provide a treble damage remedy under section 4 of the Clayton Act to everyone who could claim "injuries that might conceivably be traced to an antitrust violation."

Petitioner is also mistaken in asserting that if the lower Courts' determinations are permitted to stand, respondents will be able "to conduct their illegal Showcase system . . . with impunity from suit." (p. 9). As the Circuit Court noted "nothing [herein] precludes a distributor or exhibitor against whom the alleged conspiracy [was] directed from bringing a treble damage suit against [respondents]" (36a). Actually, the legality of the Showcase method has been squarely raised in cases already pending brought by parties with proper standing—*viz.*, competing exhibitors who alleged that Showcase deprives them of the right to license certain pictures. See, *e.g.*, *Glen Cove Theatre, Inc.* v. *United Artists Corp.*, 66 Civ. 661 (S. D. N. Y.).

In claiming that the decision below effectively deprives petitioner from recovering its alleged damages, petitioner studiously overlooks the existing state court remedy for the breach of contract pleaded by it herein as counts four, five and six (15a-17a). Thus, it is only the windfall of treble damages which is to be denied and not the recovery of any damages actually sustained by it. As recognized in *Fields Productions, Inc.* v. *United Artists Corp., supra,* petitioner's proper remedy is for "breach of contract" rather than an action for "violation of the antitrust laws." See also, *Salerno* v. *American League of Professional Baseball Clubs,* 429 F. 2d 1003 (2d Cir. 1970), *cert. denied,* 400 U. S. 1001 (1971).

CONCLUSION

For the reasons above set forth, the petition for a writ of certiorari should be denied.

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